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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 373

CAMERON IRON WORKS, INC.,

Petitioner,

v.

LODGE NO. 12, DISTRICT NO. 37,
INTERNATIONAL ASSOCIATION OF MACHINISTS,

Respondent.

PETITIONER'S MOTION FOR LEAVE TO FILE ANNEXED PETITION FOR REHEARING AND PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S MOTION FOR LEAVE TO FILE PETITION FOR REHEARING OF ORDER DENYING WRIT OF CERTIORARI

Petitioner respectfully moves for leave to file the annexed petition for rehearing of the petition for writ of certiorari in this case denied on November 10, 1958. Rehearing is sought at this time because, as is pointed out more fully in the annexed petition, this Court has granted certiorari in No. 89, October Term, 1961, *Smith* v. *Evening News Association,* to review the decision of the Supreme Court of Michigan which presents the question of whether the National Labor Relations Board's jurisdiction is exclusive over conduct which is an unfair labor practice under the National Labor Relations Act, As Amended, and, also, a breach of a collective bargaining agreement. *Smith* is a suit for damages for an alleged breach of contract. This petitioner raised this same question in a suit for specific performance of an alleged breached contract nearly four years ago, i.e., the exclusive jurisdiction of the Board over conduct, which,

likewise, is admittedly within its jurisdiction, e.g., discharge by an employer of employees for concerted activity in the course of a strike, but concerning which the Union seeks to compel arbitration pursuant to a collective bargaining agreement in an action for specific performance brought under Section 301 of the Act. Each case is a suit based on an unfair labor practice which is a breach of union contract. The only distinction is that *Smith* seeks money damages while this case seeks specific performance as the remedy for the contract breach.

Although this petition for rehearing is filed after the expiration of the time prescribed in Rule 58, the grounds upon which it is based arose after such time; and the Court clearly has power, in its discretion, to entertain the petition *United States* v. *Ohio Power Company*, 353 U.S. 98.

May 9, 1962.

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner prays that this Court grant rehearing of the petition for writ of certiorari denied by its order of November 10, 1958, 358 U.S. 880, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit in the above entitled case as prayed for in the petition filed herein September 17, 1958.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

Present Status of the Case

Petitioner was granted summary judgment in respondent's suit for specific performance of arbitration of strike discharges. The Court of Appeals reversed and remanded the action for trial on the merits, 257 F. 2d 467, and this Court denied certiorari. Adjudication at that point foreclosed petitioner on its further insistent urging of the

exclusive jurisdiction of the National Labor Relations Board over the alleged unfair labor practices of which the specific performance suit sought to compel arbitration.

Subsequent to the denial of the writ in this case, two questions were raised upon a trial of the merits — whether the negotiation history of a "strike settlement memorandum" established that the parties agreed that the grievances would not be subject to the grievance and arbitration procedure of the collective bargaining contract and whether the arbitrator had authority under the collective bargaining agreement to order the payment of back wages. The District Court for the Southern District of Texas held that these parties had not agreed to exclude the grievances from the arbitration procedure and decreed specific performance compelling arbitration of the grievances, but also held that the arbitrator did not have authority to order the payment of back wages. 183 F. Supp. 144. Respondent appealed from that part of the decree concerning back pay and the Court of Appeals for the Fifth Circuit, on June 27, 1961, reversed and held that the arbitrator did have authority to award back pay. 292 F. 2d 112. Petitioner petitioned for a writ of certiorari, No. 433, October Term, 1961, to review this action by the Court of Appeals, which was denied on December 4, 1961. 368 U.S. 926. The grievances involved in this case have not been arbitrated and the Court may issue the writ with the parties in the same status as they were nearly four years ago when the petition was first filed.

Comparison of Smith and Cameron

In *Smith*, No. 89, October Term, 1961, petitioner, as assignee from various union members employed by respondent, brought an action at law in the Circuit Court of Wayne County, Michigan, to recover damages for breach

of contract. The contract provision allegedly breached was a typical "no discrimination" clause found in collective bargaining agreements. It was asserted that respondent breached this provision by permitting certain of its employees to work during a strike, although refusing work to petitioner and his assignors, thereby causing considerable loss of wages to them.

The trial court dismissed for lack of jurisdiction on the ground that petitioner charged respondent with committing an unfair labor practice under the National Labor Relations Act "[which] is an area . . . the federal government has preempted and placed in the exclusive control of the National Labor Relations Board." The Supreme Court of Michigan affirmed on the same ground, 106 N.W. 2d 785, and this Court granted certiorari on the following question:

> "Whether a suit for damages for breach of a collective bargaining agreement may be maintained in a state court, when the conduct constituting the breach of contract is also an unfair labor practice under the National Labor Relations Act."

In *Cameron* respondent sued for specific performance (based upon an alleged breach of the arbitration provision of the union contract) under Section 301 of the National Labor Relations Act to compel contract arbitration of the discharges by petitioner of fifteen employees, who were advised by petitioner "that they were discharged for alleged misconduct in connection with the strike recently concluded". Petitioner defended principally on the ground that the determination of the issue over the strike discharges was vested exclusively in the National Labor Relations Board. The trial court entered judgment for petitioner on another and secondary ground and did not reach the issue of exclusive jurisdiction of the National

Labor Relations Board. The Court of Appeals in reversing necessarily met that primary issue and held that arbitration may be specifically directed even though the subject matter of a proposed arbitration case is admittedly within the jurisdiction of the Board. 257 F. 2d 467. In its petition for writ of certiorari in this case, this petitioner presented the question this way:

> " . . . has the National Labor Relations Act, as amended, preempted the field of subject matter within the admitted jurisdiction of the National Labor Relations Board, e.g., discharge by an employer of employees for concerted activity in the course of a strike, so as to render the Board's jurisdiction exclusive, thereby depriving a private arbitration board appointed under a collective bargaining agreement of jurisdiction over the same subject matter so as to preclude a District Court from ordering such arbitration under Section 301 of the Labor-Management Relations Act?"

The striking parallel between these two cases is further brought into sharp focus by noting that the same provisions of the National Labor Relations Act, As Amended, are set forth in both petitions as those creating the unfair labor practices which the alleged conduct in each case would violate, i.e., Section 7, 29 USC §157 and Section 8(a)(1) and (3), 29 USC §158. Similarly, both petitioners have pointed to Section 10(a), 29 USC §160, empowering the Board to prevent unfair labor practices, and Section 301(a), 29 USC §185, relating to suits for violations of contracts between employers and labor organizations. The accommodation of these two vital statutory enactments to each other is presented in both *Smith* and *Cameron* as a national issue of real importance.

Smith is an action under Section 301(a) for damages for breach of union contract brought in a state court, which

this Court has only recently decided has jurisdiction of such cases, *Charles Dowd Box Co.* v. *Courtney*, No. 33, October Term, 1961, decided February 19, 1962. It squarely presents the question of whether the language in Section 10(a) that "this power [of the Board to prevent unfair labor practices] shall not be affected by any other means of adjustment or prevention that has been or may be established by *agreement, law* or otherwise . . ." preempts the field and deprives the state and federal courts of jurisdiction to entertain a breach of contract damage suit under Section 301(a), where the conduct constitutes both an unfair labor practice and a breach of contract. This, of course, is the "*law*" part of the exclusionary language in Section 10(a).

Cameron presents the "*by agreement*" aspects of the same exclusionary language, i.e., Does Section 10(a) vest exclusive jurisdiction in the Board to deal with conduct which constitutes an unfair labor practice or may the parties "*by agreement*", enforced in an action under Section 301, defeat the exclusive jurisdiction of the Board by adjudicating that same conduct before an arbitrator allowed to fashion such remedies as he sees fit?

The Court has agreed to determine whether the damage suit based on an unfair labor practice in *Smith* can be maintained and the exclusive jurisdiction of the Board thereby denied, and it should also determine the companion problem presented by this case of whether the Board can be ousted of exclusive jurisdiction by court compelled arbitration of the alleged unfair labor practice.

Petitioner in *Smith* supports this very conclusion for, after quoting from the Court of Appeals' opinion in our case and citing numerous other decisions with similar holdings (p. 9 of Smith's petition), he points out:

"It is true that in most of these cases the action to enforce the contract took the form of an action to compel arbitration, though three involved damages for breach of contract, i.e., United Steelworkers, Local 4264 v. New Park Mining Co., (10th Cir., jurisdiction upheld); Textile Workers v. Arista Mills Co., (4th Cir., jurisdiction upheld); and Local 774, IAM v. Cessna Aircraft Co., (Kan. Sup. Ct., jurisdiction denied). Also, Judge Magruder has suggested that '[w]ith respect to arbitrators, as distinguished from courts, a narrower position concerning the preemption doctrine is possible.' United Electrical Workers, Local 259 v. Worthington Corp., 236 F. 2d 364, 367, 38 LRRM 2507, 2510 (1st Cir. 1956). And see Note, 'Jurisdiction of Arbitrators and State Courts Over Conduct Constituting Both a Contract Violation and an Unfair Labor Practice,' 69 Harv. L. Rev. 725, 736-737 (1956). *However, the courts which have passed upon the point have usually not drawn any such distinction, but have simply asserted that, when the same conduct may constitute both a breach of a collective bargaining agreement and an unfair labor practice, the aggrieved party has the option of proceeding in court on the contract.* See, e.g., United Steelworkers, Local 4264 v. New Park Mining Co., 273 F. 2d 355, 357-358, 45 LRRM 2158, 2161 (10th Cir. 1959). The Courts below in the present case did not suggest that a different result would have been reached had this proceeding been an action to compel arbitration instead of a suit for damages, though respondent argued that the two types of cases should be distinguished. In any event the matter is an important one which should be resolved by this Court." (Emphasis added.)

Exclusive Jurisdiction of the NLRB v. Court Compelled Arbitration Still Unresolved

There has been no change in the status of the law since the Court of Appeals in our case declared that the issue of

whether a federal district court may enforce arbitration under Section 301 of the Act of an alleged unfair labor practice within the jurisdiction of the National Labor Relations Board under Sections 7, 8 and 10(a) of the Act had not been previously decided by the Supreme Court. The Court said:

> "This question has not been previously raised in this Court, *nor has it been decided by the Supreme Court.*" (257 F. 2d at 472, emphasis added.)

There has been no clarification by the Supreme Court since the Court of Appeals for the First Circuit in *United Electrical Workers* v. *Worthington Corp.*, 236 F. 2d 364 (1956), made the same declaration:

> "However, there has not yet been a Supreme Court decision involving the jurisdiction of a court or arbitrator over acts constituting a contract violation as well as an unfair labor practice." (236 F. 2d at 367)

Further, the same conflict between the decision of the Court of Appeals in our case and the decisions of other Courts of Appeals is still unresolved, and remains as the Court of Appeals in our case recognized it in footnote 14 to its opinion, when it stated:

> "The following cases held that the jurisdiction of the Board in the field of unfair labor practice would preempt state agencies *or private arbitrators* from acting: NLRB *v.* International Union, 7th Cir. 1952, 194 F. 2d 698; NLRB v. Wagner Iron Works, 7th Cir. 1955, 220 F. 2d 126; McAmis v. Panhandle Eastern Pipe Line Co., Mo. Ct. App. 1954, 273 S.W. 2d 789." (257 F. 2d at 472)

In fact the conflict has become more pronounced through the Court of Appeals' decision in *Operating Engineers*,

Local 715 v. *Gulf Oil Corporation*, 262 F. 2d 80 (1958), cert. denied, 359 U.S. 992, and the decision of the Court of Appeals for the Tenth Circuit in *United Steelworkers of America* v. *New Park Mining Co.*, 273 F. 2d 352 (1959), both holding under similar fact situations that there was not exclusive jurisdiction in the Board, while the Court of Appeals for the Ninth Circuit in *Portland Web Pressmen's Union* v. *Oregonian Pub. Co.*, 286 F. 2d 4 (1960), affirmed a trial court judgment dismissing a complaint brought under Section 301 to compel arbitration with the statement:

> "We likewise agree with the district court that any rights which appellant Pressmen might claim would arise under the National Labor Relations Act and that exclusive jurisdiction would be with the National Labor Relations Board." (286 F. 2d at 8)

A petition for writ of certiorari was denied in the latter case, 366 U.S. 912, but the order notes that Justices Black and Douglas were of the opinion that certiorari should be granted seemingly on the very point raised here and upon the companion point to that on which certiorari was granted in the *Smith* case.

Potential Conflict if Exclusive Jurisdiction in the NLRB is not Found

A few cases since the Court of Appeals decision in this case suffice to highlight the potential and actual conflicts inherent in a holding that arbitration may be compelled of grievances involving conduct which also constitutes an unfair labor practice. At least three courts have held that arbitration was not precluded and, in fact, compelled arbitration even though the jurisdiction of the Board had been invoked by filing unfair labor practice charges based upon the same conduct:

(1) *Glass Bottle Blowers Association* v. *Arkansas Glas Container Corp.*, 183 F. Supp. 829 (D.C. Ark. 1960), wher the union filed an unfair labor practice charge with th National Labor Relations Board during the processing o the grievance, and the Board dismissed the charge findin insufficient evidence of a violation of the law.

(2) *Retail Shoe & Textile Sales. U.* v. *Sears Roebuck Co.*, 185 F. Supp. 558 (D.C. Calif. 1960), where the compan refused to arbitrate and the union filed both an action t compel arbitration under Section 301 and an unfair labo practice charge with the Board, which had not yet bee acted upon by the Board at the time the Court rendered it decision.

(3) *In re Dalero Corp.*, 213 N.Y.S. 2d 661, (N.Y. Sup Ct. 1961), where the court denied the company's applicatio to stay arbitration, although unfair labor practice charge had been filed, on the ground that the Board had refused t issue a complaint for the reason that the alleged violation occurred more than six months prior to the filing of th charge.

The ultimate in potential conflict and confusion is readil apparent in the following statement by the Appellate D vision, New York Supreme Court, in *Carey* v. *Westinghous Electric Corporation*, 221 N.Y.S. 2d 303 (1961):

> "We start with the proposition that a breach of co tract does not become ipso facto incapable of arbitra tion because it also happens to be an unfair labo practice (Lodge No. 12, v. Cameron Iron Works, 2 F. 2d 467, U.S.C.A. 5th Circuit). In other words, th field is not pre-empted. On the other hand, where th NLRB has assumed jurisdiction the orderly proces of justice demands that the matter should not be sub mitted to another forum, even though a breach of co tract may be involved (Matter of Amperex Electron

Corporation [Rugen], 284 App. Div. 808, 132 N.Y.S. 2d 93). *The dividing line between these extremes would seem to be best fixed at that point where the peculiar expertise of the NLRB has found expression.* Undoubtedly one of the fields in which it has so found expression is that of representation. The claims of conflicting unions representing different classifications of employees within one company may be said to be its special province. And there are, of course, other fields. When it is sought to invade one of those fields it is immaterial whether the interference is contemporaneous with the Board's decision (as in Matter of Amperex Electronic Corporation, supra) or seeks to avoid it by a subsequent application to arbitrate (Matter of Apex Lumber (Teamsters Local), 15 Mis. 2d 15, 179 N.Y.S. 2d 503) or seeks to anticipate it, as here. That is not to say that where the question of contract breach is direct and the question of representation is peripheral, arbitration may not be had. It may. (Freight Drivers v. Quinn Freight Lines, Inc., 195 F. Supp. 180, U.S.D.C., Mass.)". (221 N.Y.S. 2d at 308, emphasis added)

CONCLUSION

This Court has not expressly decided the important questions under the National Labor Relations Act, As Amended, of whether the jurisdiction of the National Labor Relations Board provided for in Section 10(a) of the Act is exclusive over subject matter within the admitted jurisdiction of the Board and deprives the state and federal courts of jurisdiction over the same subject matter in (1) a damage suit action under Section 301 for breach of contract, and of (2) an action for specific performance to compel arbitration of an alleged unfair labor practice under Section 301. The Court has agreed to determine the damage suit question and it should decide the arbitration question at the same time.

At the time of the trial on the merits and at the ti
of the second petition for writ of certiorari to this Cou
petitioner was foreclosed on further pleading the exclusi
jurisdiction of the National Labor Relations Board. T
granting of the writ in the *Smith* case should now op
that door. These discharges for concerted strike acti
have still not been arbitrated. They are still alleged unfa
labor practices within the exclusive jurisdiction of t
National Labor Relations Board. If necessary, this petiti
for rehearing should be considered as filed in and shou
be granted on both of the two prior petitions for writ
certiorari to the end that the issue of the exclusive juri
diction of the National Labor Relations Board, which p
titioner vainly sought to have previously adjudicated, ma
be passed upon at the same time that the like issue
adjudicated in the *Smith* case. This is implored that p
titioner may have its day in court on this issue and to t
end that justice may be done.

For the reasons set forth above, and in the petitions fo
writ of certiorari, it is respectfully urged that rehearing
granted and that, upon such rehearing, a writ of certiora
issue to the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

.....

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